

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1208

To be argued by
Barry A. Bohrer

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA, :

Appellee. :

-against- :

SANDY CHECK, :

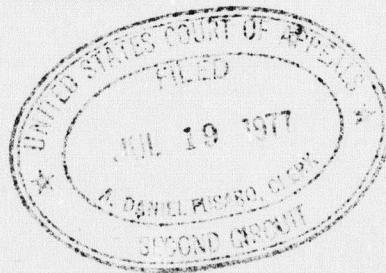
Defendant-Appellant. :

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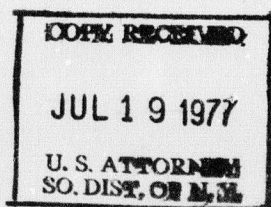
Docket No. 77-1208

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF



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Preliminary Statement

This brief is submitted on behalf of Appellant Sandy Check, in reply to specific arguments and statements made in the brief of Appellee United States of America. Failure to reply to a particular matter in the Government's brief means only that the matter has been sufficiently addressed in Check's main brief or that it is insignificant with respect to the disposition of this case.

ARGUMENT

POINT I

THE ADMISSION OF PREJUDICIAL HEARSAY
CONSTITUTED REVERSIBLE ERROR.

A. Check Properly Preserved the Issue

The District Court committed clear error in allowing the admission of numerous conversations between Cali, the Government's informant, and Spinelli, a Detective in the New York Police Department, through the latter's testimony at trial. From the outset of Spinelli's testimony, trial counsel lodged specific and continuing objections to the admission of his hearsay.

The Government, as its leading issue, argues strenuously, and erroneously, that the claim now raised on appeal was not properly raised in the District Court. A review of the record reveals that the Government's contention is nothing short of ludicrous. On the fifth page of the transcript reporting Spinelli's testimony, Chec.'s trial counsel made a continuing objection to "any conversation with Cali" (64). Co-counsel further articulated the ground for the objection:

MR. AMSTERDAM: Also, your Honor, insofar as they are not in furtherance of the conspiracy, it is just straight hearsay.

THE COURT: We have to determine that.
We can't determine that now.
I will take it subject to
connection.* (64)

Thus, the objection was specific, clear, and timely made. F.R. Evid 103(a)(1). Rule 103 does not prescribe the precise form which objections should take. However, in considering the propriety of making an objection, its purpose should be born in mind: clarifying for an adversary what is objectionable so that error may be corrected; and, bringing the matter to the Court's attention so that it may be ruled upon intelligently and quickly. Weinstein, Evidence, ¶103 [01] at 103-6 (1976).

In the present case, the early and timely objection of Check's trial counsel surely alerted the Government and the Court to what was deemed objectionable so that it could be corrected. Indeed, apparently aware of the probability that such objection would be raised, the Assistant United States Attorney readily shifted gears.**

* Indeed, with the help of the Government, the Court would very well have determined whether Cali's statements were in furtherance of the conspiracy. Much later in the proceedings, when pressed by the Court, the Government admitted that, at the time of these conversations, Cali was not a co-conspirator, but an agent of the Government.

** Footnote on the following page.

MR. SUDLER: Your Honor, I will phrase the questions in terms that do not violate the hearsay rule. (64)

(emphasis supplied)

Clearly, then, the Assistant's response to the objection is eloquent proof that counsel made a clear, contemporaneous objection, while stating the specific ground on which it was based.

Yet the Government would have this Court believe that the first time an objection was raised in this regard was well after many of the evidentiary transgressions had already occurred (Gov. Brief at 11). A review of the record, however, exposes the disingenuousness of the Government's contention.

Soon after the Government, in response to objection, had assured the Court that it would rephrase questions in order to circumvent any further violations of the hearsay rule, defense counsel once again were forced to object for the very same reason. In response to objection by defense counsel, the

******(footnote from previous page)

It seems that Spinelli also was well prepared to meet this contingency. His answers neatly weaved Cali's statements together with his own, the total effect being Spinelli's "own statements" to Cali.

Assistant United States Attorney, obviously aware of the specific ground of the objection from the context, F.R. Evid. 103(a)(1), once again rephrased the question in an apparent attempt to circumvent the hearsay rule, by asking Spinelli to delete any reference to Cali's statements (77).

Again, questioning Spinelli in a manner intended to give the impression that it was within the confines of the hearsay rule, the prosecutor asked the witness:

Q. Again, without telling us what Mr. Cali said to you during the conversation, what did you say to him? (78)

Spinelli's answer to this question was followed by an immediate objection from defense counsel:

MR. MAHLER: Again, I object. This is what Mr. Cali is telling --

MR. SUDLER: No. I am asking Detective Spinelli what you said to Mr. Cali, not what Mr. Cali said to you.

MR. MAHLER: I move to strike that portion.

THE COURT: All right. That part is stricken, what Cali said to you (79).

Subsequently, Spinelli again incorporated Cali's hearsay statements into his testimony under the guise of stating his response to Cali. Defense counsel objected:

MR. MAHLER: In addition, if I might, Your Honor, the officer Spinelli just testified that

the man was an unknown male, presumably a business about having a name came from Cali. So he is just getting in a hearsay statement indirectly.

MR. SUDLER: Your Honor, if I may say, there was obviously conversation that occurred. As far as what William Cali said, that is hearsay; we acknowledge that. As far as what Detective Spinelli may have said to Cali on that day, it is not hearsay. He is present in court ready to be cross-examined, Detective Spinelli, as to those statements. (86) (emphasis supplied)

There can be no doubt that defense counsel fairly apprised the prosecutor of the specific ground for the objection in this instance; the prosecutor responded directly to the issue of inadmissible hearsay.

Soon thereafter, defense counsel raised an objection, the specific ground of which was surely apparent from the context. See F.R. Evid. 103(a)(1). The Government contends that the basis of defense counsel's objection was not that the testimony of Spinelli was hearsay, but that it was "self-serving." (Gov. Brief at 11). However, the record discloses that the colloquy accompanying the objection made clear to the Court the specific ground that was being raised:*

* The Government asserts in a footnote (Gov. Brief at 11) that at no time during that colloquy did Check's attorney ask that the testimony be stricken. The colloquy was initiated as follows:

MR. MAHLER: I object to this again and move to strike. (92)

MR. MAHLER: Again, this is a self-serving statement. There is no foundation for this testimony that anybody was anybody else's runner, or anything like that.

THE COURT: The witness is here to be cross-examined. I don't know what you mean by "self serving." There is no such objection as "self-serving."

MR. MAHLER: Judge, if I may just be heard a little further, I think that you sustained the objections as far as conversations at this point with Cali. What is merely being done is Cali's information is being paraphrased by this witness.

(92-93) (emphasis supplied)

Six pages further in the record, defense counsel brought this same matter to the attention of the Court once again:

MR. AMSTERDAM: Your Honor, I am going to have a continuing objection to that also, both on the grounds of hearsay and on connection.

THE COURT: The objection is hearsay?

MR. AMSTERDAM: ...[w]hat the witness is doing is rephrasing what Cali told him, so that there is a hearsay problem. (99-100)

Subsequently, defense counsel properly (even according to the Government) objected to this same method

of examination:

Q. Without telling us what he said to you, what did you say to him?

A. I instructed Cali at the time, I didn't care about their problems, what they were having with their connections and their suppliers ---

MR. MAHLER: I object to this type of--this is just paraphrasing evidently what Cali said to him (117).

Judge Motley, notwithstanding a clear, contemporaneous and proper objection, overruled the objection. The Government would have this Court believe that defense counsel did not ask to have the inadmissible portion of Spinelli's testimony stricken* (Gov. Brief at 12 n.). However a review of the record shows otherwise:

MR. MAHLER: I again move to strike that type of testimony.

Again, all that is paraphrasing what Cali told him. (118)

Indeed, in order to insure that the Court was aware of the specific ground for the continuing objections that defense counsel had lodged, Check's counsel reiterated the

* To the extent that Judge Motley had already overruled the same objection moments before, a motion to strike would seem superfluous.

argument:

MR. MAHLER: No, Judge, what I am trying to do is clarify for the record the basis of our objection to the entire testimony of this witness on the witness stand. We feel it is complete hearsay, a paraphrasing of the informant's testimony, and the confidential informant is a complete non-co-conspirator in this case (140).

MR. MAHLER: I just want it made clear that the objections we made as hearsay in the past are based on the fact that in our opinion under the facts adduced here so far, the confidential informant Cali is not a co-conspirator, but an agent of the Government. All conversations of his are hearsay and should not be admissible, and that all the witness is doing is repeating in his so-called answer the message given to him by the confidential informant. This is really the line of our objection.

THE COURT: You made your objections clear...
(141)*

Thus, the record makes it crystal clear that trial counsel properly preserved the hearsay issue by making numerous timely objections or motions to strike the inadmissible testimony. The record reflects that counsel stated the specific grounds for the objections or that the specific ground was apparent from the context. F.R. Evid. 103(a)(1). It cannot be disputed that both

* Even after Judge Motley acknowledged that she was aware of and understood the specific ground for the objection, she continued to overrule it (152-153).

the Government and the Court were well aware of the nature and specifics of each objection, affording each an opportunity to react accordingly: the Government by correcting the error and the Court by ruling on the matter. Undoubtedly, the issue was preserved for review by this Court.

B. Spinelli's Testimony was Admissable

The District Court erred in admitting a vast amount of Detective Spinelli's testimony which improperly integrated hearsay utterances of informant Cali into recitations of past statements ostensibly made by Spinelli. The Government argues that Spinelli's testimony was not hearsay because it was not admitted to prove the truth of the matter asserted. The Government further argues that Spinelli's testimony consisted of his own prior statements and thus did not constitute inadmissible hearsay. These contentions are wholly without merit.

For the first time, on appeal, the Government argues that Spinelli's testimony concerning what he told Cali was not admitted to prove the truth of the matter asserted, but was admitted "to aid the jury in understanding the background events leading up to the crimes in question." A review of the record, however, reveals no such limited purpose proffered for the admission of this testimony. It ill behooves the Government belatedly to make this contention when it did not inform either

the trial judge, defense counsel -- or the jury -- of the limited purpose for which this testimony was proffered. The Government may not now effectively "sandbag" the defendant and the trial judge by arguing from hindsight.

The Government's reliance upon United States v. Lubrano, 529 F.2d 633 (2d Cir. 1975); United State v. Ruggiero, 472 F.2d 599 (2d Cir. 1973); and United States v. Manfredonia, 414 F.2d 760 (2d Cir. 1969), misses the mark. In Lubrano, supra, this Court held similar testimony -- instructions by a Government Agent to his agent preceding a narcotics transaction -- to be relevant to aid the jury in understanding the background events in question, but also stated that the testimony was inadmissible as proof of the matters asserted. Id. at 529F.2d at 637. See also, Ruggiero, supra.

The statements admitted in Manfredonia, supra, unlike those in the present case, were offered for a limited purpose and not for the truth of what was said. In Manfredonia, the trial court made this clear in its charge to the jury. Here, the trial judge did not instruct the jury as to the limited purpose of the testimony since the Government gave no indication that its offer was so limited.*

* In addition, the Government erroneously contends that Spinelli's statements constituted non-hearsay "verbal acts." Spinelli's statements were nothing more than assertions in response to Cali's reports of his discussions with Check. The non-verbal conduct which Spinelli's utterances purportedly explained was his meeting with Cali, the character of which was not in issue.

The Government also contends that since Spinelli testified at trial and was subject to cross-examination, his prior extra-judicial statements did not constitute hearsay. This blanket proposition improperly extends the law with regard to hearsay beyond its present limits. The traditional view is that a prior statement of a witness is hearsay if offered to prove the happening of matters therein. McCormick, Evidence, ¶251 at 601 (2d Ed. 1972).

While the Government may find support for its position in the Uniform Rules of Evidence 63(1), which would have exempted all prior statements of a witness from the definition of hearsay, the Federal Rules of Evidence simply do not go that far. Prior consistent statements are given substantive effect by Rule 801 (d) (1) (b) only if they are admitted to rebut charges of recent fabrication or improper influence or motive.

Even in the decisions rendered prior to the promulgation of the Federal Rules, this Court did not go so far as to allow the admission of statements similar to those of Spinelli in the present case. Judge Friendly stated in United States v. Bennett, 409 F.2d 888, 895 (2d Cir. 1969), "...we are not approving a general practice of admitting prior consistent extra-judicial statements of a witness, such as those made to investigating

officers, for the truth of the matter asserted.*

The Government makes much of the fact that it sought to limit its questions of Spinelli to his own statements. Clearly, the admissability of Spinelli's prior statements was pegged to the fact that information was received from Cali. Indeed, Spinelli's testimony makes it apparent that he was merely a conduit for the introduction of Cali's hearsay version of events,** that version not being subject to the rigors of cross-examination. Check was thus denied his right to confront a critical but absent witness against him - the principal purveyor of much of the information which ultimately became evidence.

The Government argues cryptically that it hoped to call Cali as a witness, but became concerned when he failed to appear at the commencement of the trial in response to a subpoena (Gov. Brief at 14). Yet the record, even as quoted by the Government, indicates otherwise: the prosecutor interrupted counsel's opening statement regarding Cali's qualities as a witness to object, in essence, to counsel's apparently unwarranted assumption that Cali would testify (Gov. Brief at 15).

* The conversations between Spinelli and Cali amount to no more than two investigating officers (or the functional equivalent) talking to each other.

**In its brief, the Government concedes that Cali's statements were at issue. (Gov. Brief at 16, fn.)

Although the Government now argues otherwise, not once during the trial did the prosecutor state that it was his intention to call Cali as a witness. Indeed, his only statements were to the contrary (43,266). Perhaps because of an excess of caution or because of trial strategy, the Government requested a charge, a voir dire question, and a material witness warrant all relating to Cali. Yet its on-the-record statements evinced, at best, a disinclination to produce Cali as a witness. This would explain the convoluted and improper manner in which Spinelli set the substance of the case before the jury.

Thus, by virtue of Spinelli's incorporation of Cali's version of events, the Government purposefully circumvented the hearsay rule and the Confrontation Clause, thereby denying Check the right to confront this crucial witness.

POINT II

THE ADMISSION INTO EVIDENCE OF DEATH THREAT TESTIMONY CONSTITUTED REVERSIBLE ERROR.

The District Court erred in admitting death threat statements purportedly made by Check to Spinelli. During his direct testimony, Spinelli gratuitously mentioned, upon inducement by the Government, that Check had stated he would not hesitate to shoot anyone if he had any problems. This testimony improperly brought Check's character into question, thereby denying him a fair trial. The Government dismisses Check's substantial contention that this testimony was irrelevant and highly inflammatory by arguing that Check's statement was an admission relevant to show his intent and consciousness of guilt. The Government ignores, however, the extreme prejudice inherent in such testimony which, based upon the circumstances in the present case, clearly outweighed its probative value.

Contrary to the Government's contention, this Court has held such death testimony to be excludable in the absence of exceptional circumstances. United States v. Malizia, 503 F.2d 578 (2d Cir. 1974). In this case, there were absolutely no exceptional circumstances justifying the admission of this testimony.

The general rule, followed in this Circuit, is that an "impeached witness" may always endeavor to explain away the effect of a supposed inconsistency by relating whatever circumstances would naturally remove it." 3A Wigmore, Evidence, ¶1044, at p. 1062 (Chadbourn rev. 1970),: United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972) (emphasis supplied).

Thus, in Cirillo, one Preiss admitted on cross-examination that in prior statements to narcotics agents, and testimony before the grand jury, he had failed to mention his meetings with Cirillo. In an attempt to rehabilitate the witness on redirect, the Government tendered an offer of proof and a hearing was held outside the presence of the jury. Preiss stated that he did not mention the meetings with Cirillo because he feared that Cirillo would kill him if he did. Preiss then was permitted to relate these facts in open court, but not before the trial judge cautioned the jury that the statements were admitted solely for the purpose of explaining away any inconsistency brought out on cross-examination. The same cautionary instructions were given, in substance, in the court's final charge.

In United States v. Malizia, supra, in an effort to explain the absence of the informant-purchaser, the Government tendered an offer of proof to show that the informant had told the witness that he would never testify because he was in fear

of being killed. Judge Motley indicated to defense counsel that if he did not intend to comment adversely on the Government's failure to produce the informant, the testimony regarding the failure of the witness to appear would be excluded. Only after defendant rejected the suggestion did the Court allow the Government to explain why the informant was not produced at trial, on the premise that the probative value of the testimony was sufficient to outweigh its prejudicial effect. On appeal, this Court, recognizing that death threat testimony "is so prejudicial that it should be excluded in the absence of exceptional circumstances," Id., 503 F.2d at 581, held that defendant's decision to exploit the absence of the witness in the face of an option to exclude the death-threat testimony constituted such an exceptional circumstance that the Government could anticipatorily rebut the claim that it should have produced the witness.

In United States v. Panebianco, 543 F.2d 447 (2nd Cir. 1976), the jury heard testimony of threats made on the life of witness Mobley by defendant Rizzo. In considering Rizzo's claim, this Court noted that during direct examination the prosecutor carefully steered Mobley away from mentioning any threats. However, on cross-examination, Mobley was asked in detail about having set up her employer, Clark, by planting heroin

on him. On redirect, the Government was allowed to clarify this matter by eliciting from Mobley that Rizzo had threatened to kill her and that Clark had been instructed to kill her. In upholding the admission of the death-threat testimony under these circumstances, this Court stated: "where cross-examination has been used to elicit an incomplete picture which gives a distorted impression of a witness's credibility, the prosecution should generally be allowed to set the record straight on re-direct." Id. 343 F.2d at 455.

The present case, by contrast, stands in sharp relief from the ameliorative measures taken by the prosecutor and judge in these cases justifying the admission of the highly prejudicial testimony. Here, the trial judge admitted, on direct testimony and without cautionary instructions, the inflammatory testimony of an unimpeached witness. Here, the prosecutor did not even tender an offer of proof prior to the proffer of this obviously prejudicial evidence. Compare, United States v. Cirillo, supra; United States v. Malizia, supra.

Nor did the prosecutor carefully steer Spinelli away from mentioning any threats. Compare, United States v. Panebianco, supra. Rather, the prosecutor rushed headlong into this inherently prejudicial matter by eliciting the testimony in the following manner:

Q. Detective Spinelli, during your conversations with Mr. Check did Mr. Check ever make a reference to somebody being killed? (194).

Moreover, this testimony was not introduced to rebut possibly misleading implications raised by cross-examination, but, rather, as part of the witness's direct testimony. Compare, Cirillo, supra, and Panebianco, supra, where an impeached witness was allowed to testify about death threats to set the record straight on redirect.

The Government sought to justify its proffer of this evidence by arguing that it would explain Spinelli's failure to wear his gun and his failure to wear a recording device.* Yet, Spinelli was, in fact, wearing a firearm at the time Check allegedly made the threat. Furthermore, Spinelli had not even been questioned regarding the absence of recording equipment.

On appeal, the Government attempts to distinguish Cirillo, Malizia, and Panebianco, arguing that in those cases, the evidence admitted were death threats emanating from someone other than the defendant. The Government further argues that this

* Judge Motley overruled counsel's objection based upon these purported justifications.

Court found the testimony admissable even though there was absolutely no connection of the threat with the defendant.

An examination of these cases shows the Government's contention to be utterly without factual support. In Cirillo, supra, the witness testified that he did not mention prior meetings with the defendant because he feared that Cirillo would kill him if he did. In Panebianco, supra, the testimony concerned threats made by defendant Rizzo on the life of witness Mobley. Thus, the Government's argument in this regard is meritless.

Additionally, in the present case, Judge Motley, unlike the trial judge in Cirillo, failed to caution the jury with respect to the limited purposes for which the statement was offered. In Cirillo, the trial judge cautioned the jury that the statements were admitted solely for the purpose of explaining away any inconsistency brought out on cross-examination. Here, of course, the error in admitting the prejudicial testimony was compounded by the fact that it was not admitted to explain away any inconsistency, since none had been apparent.

Thus, the trial judge improperly allowed into evidence highly prejudicial testimony relating death threats purportedly made by defendant Check without any justification for its admission.

Unlike those cases in which this Court has, with some hesitation, countenanced the admission of such testimony, here an unimpeached witness was induced by the Government, during direct testimony, to state that the threats had been made. Clearly, the limited probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. Particularly in light of the failure of the Government's informant, Cali, to testify, the error cannot be regarded as harmless. Surely, the jury reasonably could have inferred that Check's threats had some relation to Cali's absence at trial. Accordingly, there can be no doubt that the error in this case was patently prejudicial and constituted reversible error. United States v. Malizia, supra, 503 F.2d at 581.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Check's main brief, the judgment of conviction should be reversed and a new trial ordered.

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Respectfully submitted,

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